UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PFIZER INC.	)	
	)	
AND	)	**CASES 10-CA-175850**
	)	**07-CA-176035**
REBECCA LYNN OLVEY MARTIN, an individual	)	
	)	
AND	)	
	)	
JEFFREY J. REBENSTORF, an individual	)	
	)	

PFIZER INC.'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Pfizer Inc. ("Pfizer" or "the Company") submits this Reply Brief in response to Counsel for the General Counsel's Brief in Response to Pfizer's Exceptions ("CGC Brief"). Counsel for the General Counsel argues therein that the class/collective action waiver in Pfizer's Arbitration Agreement is lawful according to the Supreme Court's recent decision in *Epic Systems Corporation v. Lewis*, 138 S. Ct. 1612 (2018). In addition, Counsel for the General Counsel argues that the confidentiality clause in Pfizer's Arbitration Agreement is lawful as a Category 2 rule under the standard set out in *The Boeing Company*, 365 NLRB No. 154 (2017). CGC Brief, at 1.

While Pfizer agrees with the General Counsel's conclusions that the Arbitration Agreement's class/collective action waiver and confidentiality provisions are lawful, Pfizer submits this Reply Brief in order to address certain points in the General Counsel's analysis that are inconsistent with *Epic Systems* and the *Boeing* standard. Pfizer also urges the Board to confine its decision to the Complaint allegations in this case. The Board should not, as the General Counsel suggests, opine on issues that are not presented in this case.

II. ARGUMENT

A. Arbitration Agreements Are to Be Enforced According Their Terms under the Federal Arbitration Act, and the Board Cannot Read Standards from the National Labor Relations Act into the Federal Arbitration Act or Its Savings Clause.

The General Counsel is correct that the Supreme Court in *Epic Systems* held that an arbitration agreement which bars class or collective action proceedings does not violate the NLRA. CGC Brief, at 2. The General Counsel is also correct that the Court so held because it found that Section 7 of the Act "secures to employees rights to organize unions and bargain

collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." *Epic Systems Corp.*, 138 S. Ct. at 1619.

The Supreme Court's decision, however, was not cabined to class action waivers; rather, it analyzed the connection between arbitration agreements and the NLRA more broadly and concluded that because the rules and procedures applied to workplace disputes in arbitration typically do *not* implicate Section 7 rights, the Board therefore may not supersede the Federal Arbitration Act ("FAA") by applying the NLRA to analyze the legality of – or strike down – terms contained in arbitration agreements relating to such procedures. *See id.* at 1624 (Section 7 "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand"); *id.* at 1627 ("Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA.").

Rather, in the sphere of arbitration agreements, the FAA reigns supreme. Although the General Counsel acknowledges these principles and accordingly advocates that the Arbitration Agreement's class/collective action waiver should be found lawful as a Category 1 rule under the *Boeing* standard, *see* CGC Brief, at 4-5, he fails to apply the same principles to the Agreement's confidentiality clause. Such a distinction is inconsistent with *Epic Systems* and the FAA.

The FAA mandates that parties be permitted to design their own arbitration procedures and *Epic Systems* confirms that such agreements must be enforced according to those terms unless "such grounds as exist at law or in equity for the revocation of any contract" render them

unenforceable. *See id.* at 1621-22 ("Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures."); *id.* at 1632 ("The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act.").

In other words, under the FAA's saving clause, courts or agencies may only refuse to enforce an arbitration agreement or its terms based on "generally applicable contract defenses," such as fraud. duress, unconscionability, or illegality. *See id.* at 1622. Counsel for the General Counsel seizes on this to argue that because illegality is a generally applicable contract defense, "the Board can and should apply NLRA law to determine whether the confidentiality provision is illegal with respect to Section 7 rights under the Act." CGC Brief, at 12. Such an attempt to read the NLRA into the FAA, however, is precisely what the *Epic Systems* Court prohibited.

Indeed, the employees in *Epic Systems* made the same argument in their attempt to justify striking down class action waivers as illegal on the basis of NLRA principles. The Court rejected this on two grounds. *Id.* at 1623. For one, the Court held that even where a defense sounds in illegality or unconscionability, it does not qualify for protection under the saving clause if it impermissibly disfavors arbitration by interfering, or taking issue with, a "fundamental attribute of arbitration." *Id.* Just as a general contract defense based on the individualized nature of the proceedings contravened this rule, so would a general contract defense based on the confidential nature of the proceedings. *See id.*; *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (noting that "the

plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself").

But more fundamentally, Counsel for the General Counsel's contention is incorrect because the only generally applicable contract defenses permitted under the saving clause are "those are those that concern 'the formation of the arbitration agreement.'" *Epic Systems Corp.*, 138 S. Ct. at 1632 (quoting *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (concurring opinion)). Because an illegality defense based on the content of the agreement – and its consistency with statutory or public policy goals – does not concern whether the contract was properly made, it does not qualify as a permissible defense under the saving clause, and the agreement must be enforced according to its terms. *See id.*

Under the FAA, the Board may only consider and apply defenses as they are defined and generally applied under contract law; the Board does not get a special say on what makes an agreement "illegal" and it may not read NLRA principles into the applicable standards. *See id.* at 1627 ("It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.").

In sum, Counsel for the General Counsel correctly applied *Epic Systems* to find that the Arbitration Agreement's class/collective action waiver is lawful "since the provision, according to the Supreme Court, does not prohibit or significantly interfere with the exercise of NLRA rights," but erroneously failed to apply the same logic to conclude that the Agreement's confidentiality clause is likewise lawful. CGC Brief, at 4-5. Rather, Counsel for the General Counsel acknowledged *Epic Systems'* holding "that the procedures to which the parties agree in

arbitration should be enforced unless clearly violative of the Act," but then inexplicably argued that confidentiality clauses like Pfizer's, "which do not prevent employees from sharing information outside of the arbitral proceeding, should be considered as lawful Category 2 provisions." CGC Brief, at 7. While Pfizer agrees with the conclusion that the Arbitration Agreement's confidentiality provision is lawful, the General Counsel fails to acknowledge that, under *Epic Systems*, the FAA and its saving clause do not permit the Board to import an analysis that is peculiar to the NLRA in determining whether the confidentiality provision is lawful.

B. Even If the Confidentiality Provision Is Analyzed Based on NLRA Principles, Rather Than General Principles of Contract Law, the Confidentiality Provision Is a Lawful Category 1 Rule Under the *Boeing* Standard.

Even if the Board were to analyze the Arbitration Agreement's confidentiality provision under the NLRA, rather than applying general principles of contract law as mandated by the FAA's savings clause and *Epic Systems*, the confidentiality provision should be deemed lawful as a Category 1 rule under the *Boeing* standard. A work rule is presumptively lawful as a Category 1 rule when "(i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Boeing*, 365 NLRB No. 154, slip op. at 3-4. Here, the confidentiality clause satisfies either prong.

1. *The Confidentiality Clause Does Not Interfere with the Exercise of Section 7 Rights.*

In addition to *Epic Systems*' holding that arbitration procedures generally do not implicate or infringe on Section 7 rights, the General Counsel's own reasoning demonstrates that the confidentiality clause does not interfere with Section 7 rights. More specifically, Counsel for the General Counsel states that, "[a]ccording to *Epic*, the NLRA did not encompass within Section 7 rights specific procedural aspects of arbitration. Accordingly, as long as an arbitral

confidentiality provision confines itself to arbitration-related matters and does not touch the type of Section 7 activities that 'employees 'just do' for themselves', it should not be interpreted to interfere with Section 7 rights." CGC Brief, at 9 (citation omitted). Counsel for the General Counsel further states that "[c]onfidentiality provisions that provide that the arbitration shall be conducted on a confidential basis or that the arbitration proceedings shall be confidential do not, on their face, 'when reasonably interpreted,' interfere with Section 7 rights." CGC Brief, at 10.

Counsel for the General Counsel recognizes that Pfizer's confidentiality provision requires only that "both parties to keep confidential the content of the arbitral proceedings, including the information and documents that are disclosed pursuant to the arbitral process" and "explicitly does not limit an employee's ability to discuss his or her terms and conditions of employment, the circumstances and reasons for discipline and any facts or materials of which the employee became aware outside of the arbitral process." CGC Brief, at 13. In other words, the General Counsel's own description of the confidentiality clause is entirely consistent with the types of clauses that, in the General Counsel's view, "should not be interpreted to interfere with Section 7 rights," and should therefore be considered lawful under Category 1. *See also* CGC Brief, at 6 ("the Board should find that arbitral confidentiality agreements that confine themselves to the matters disclosed in the course of arbitration proceedings generally do not adversely impact Section 7 rights because they do not prevent employees from discussing matters protected under Section 7 such as their terms and conditions of employment, the fact of their arbitration and their claims.").

Elsewhere in the brief, however, Counsel for the General Counsel turns this on its head, inexplicably stating that "where arbitration provisions clearly implicate Section 7 rights, they should be categorized as, and analyzed under, the *Boeing* category 2 rules. Thus, arbitration

provisions that require confidentiality touch on core Section 7 rights of employees to discuss terms and conditions of employment." CGC Brief, at 5. The General Counsel's suggestion that all arbitration provisions requiring confidentiality be analyzed under Category 2 is entirely inconsistent with the General Counsel's conclusions, based on *Epic Systems*, that confidentiality clauses like Pfizer's do not – and should not be "reasonably interpreted" to – interfere with or otherwise implicate Section 7 rights. *See* CGC Brief, at 8-9. For the same reason, the General Counsel's characterization of Pfizer's confidentiality clause as lawful under Category 2 is likewise erroneous under *Epic Systems* and inconsistent with the rationale provided, both of which suggest that it should be lawful under Category 1.

2. *Any Potential Adverse Impact on Protected Rights is Outweighed by Legitimate Justifications.*

Counsel for the General Counsel's reasoning likewise demonstrates that Pfizer's confidentiality clause is lawful under Category 1 because any potential adverse impact on protected rights is outweighed by legitimate justifications. Indeed, the likelihood that the confidentiality clause would have any potential adverse impact on protected rights is low since "[c]onfidentiality provisions that confine themselves to information concerning matters disclosed in the arbitration hearing and relating to the arbitration do not significantly implicate Section 7 rights, and therefore, in conformity with *Epic*, such agreements should be enforced as written." CGC Brief, at 7.

In addition, Counsel for the General Counsel acknowledges the legitimate justifications for maintaining the confidentiality of arbitration proceedings. *See* CGC Brief, at 6-7 ("[C]onfidentiality has long been recognized as an issue in arbitration proceedings and specifically part of the arbitration procedure determined by the parties."); *see also id.* at 10 n.3 ("It should be noted that employees may benefit as much as employers in keeping an arbitration

awards confidential, particularly in cases in which the arbitrator upholds an employee's discharge."). These legitimate justifications, among others, far outweigh any potential adverse impact that Pfizer's confidentiality clause could have on employees' protected rights, which even the General Counsel acknowledges is "slight." CGC Brief, at 10. The Board should accordingly find that the confidentiality clause is lawful under Category 1.

C. The Board Should Not Opine on Potential "As Applied" Challenges to the Confidentiality Clause in the Context of a Facial Challenge to the Agreement.

Applying the principles in *Epic Systems* and *Boeing* to the confidentiality clause in Pfizer's Arbitration Agreement, Counsel for the General Counsel correctly observes that "on its face, the provision contains no unlawful limitation on employees' Section 7 rights." CGC Brief, at 13. He then states that although "lawful as written under *Boeing*, injudicious use of the provision could render its *application* unlawful," and then continues with a discussion of potential unlawful applications. *Id.* (emphasis in original). To analyze and resolve the case before it, however, the Board need not wade into such considerations.

The Complaint alleges that the Arbitration Agreement and its terms are unlawful on their face, *not* as they have been (or theoretically could be) applied. Presented with only a facial challenge, there is no basis for the Board to opine on hypothetical "as applied" challenges to the Agreement's confidentiality clause, as the General Counsel suggests. *Cf. Enloe Med. Ctr.*, 348 NLRB 991, 992 n.6 (2006) (noting that where the General Counsel attempted to introduce evidence concerning the discriminatory enforcement of the rule in the context of a facial challenge only, the ALJ declined because such evidence went beyond the scope of the complaint). Moreover, settled Board law establishes that when faced with only a facial challenge, and "where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law." *Road Sprinkler Fitters, Local 669 (Cosco Fire*

Protection, Inc.), 357 NLRB 2140, 2142 (2011); *see also Teamsters, Local 982 (J. K. Barker Trucking Co. & Guy F. Atkins Constr. Co.)*, 181 NLRB 515, 517 (1970), *aff'd sub nom. Joint Council of Teamsters No. 42 v. N.L.R.B.*, 450 F.2d 1322 (D.C. Cir. 1971) (same). The Board should therefore limit its decision to the questions presented and find that the Arbitration Agreement is lawful on its face.

III. CONCLUSION

For the foregoing reasons, Pfizer respectfully requests the Board grant Pfizer's Exceptions to the Administrative Law Judge's decision, reverse the finding that the Arbitration Agreement's class/collective action waiver and confidentiality provisions violate the Act, and dismiss the Consolidated Complaint in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer's Reply Brief in Support of Its Exceptions to the Administrative Law Judge's Decision have been served upon the following this 4th day of September 2018 by e-mail:

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